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PETITION AND TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 116

THE UNITED STATES, PETITIONER

vs.

FELT & TARRANT MFG. CO.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 14, 1930.
CERTIORARI GRANTED JUNE 2, 1930.

(45)

PETITION AND TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 896

THE UNITED STATES, PETITIONER,

vs.

FELT & TARRANT MFG. CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

FILED MAY 14, 1930

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1 In the Supreme Court of the United States

October term, 1929. No. 896

THE UNITED STATES, PETITIONER

v.

FELT & TARRANT MFG. CO.

Petition for a writ of certiorari to the United States Court of Claims

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the Court of Claims in the above case rendered February 17, 1930, and reported in 37 F. (2d) 977.

2 Statutes and regulations involved

Section 210 of the revenue act of 1917, c. 63, 40 Stat. 300, 307, provides:

"SEC. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.

"For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used."

3 Section 1318 of the revenue act of 1921, c. 136, 42 Stat. 227, 314, provides in part:

"Sec. 1318. That section 3226 of the Revised Statutes is amended to read as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected,

until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof * * *."

Article 1036, Treasury Regulations 62, promulgated under the revenue act of 1921, provides:

"Claims for refund of taxes erroneously collected.—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath."

Statement

The respondent contends, and the United States concedes, that the respondent was entitled to a deduction from gross income for the year 1917 on account of exhaustion of patents. Had this
4 deduction been made, the respondent's tax for 1917 would have been reduced in the sum of $26,909.50. The United States agrees that the respondent would be entitled to judgment for this amount with interest, had the respondent filed a sufficient claim for refund, as required by section 1318 of the revenue act of 1921, supra, and article 1036 of Treasury Regulations 62, supra.

On February 29, 1924, the respondent filed its claim for refund without making any reference to any claim because of exhaustion of patents. The reasons on which the claim for refund was based were stated as follows (Finding 6; Schedule A):

"The taxpayer has filed with the commissioner a claim for special relief under section 210 of the 1917 revenue act for the excess-profits tax assessed for this period.

"This claim is filed to protect all possible legal rights of the taxpayer, pending, and at the date of, the settlement of the claim for relief. Computation has been made as follows:

Total profits taxes paid	$227,789.38
Less: Decrease in income taxes on account of profits taxes credit	13,667.37
Refund claimed	$214,122.01

"The taxpayer requests an oral hearing and the right of appeal in the event of an adverse decision on the part of the unit, and before any formal rejection of the claim is made."

Under this claim the respondent filed a brief and had a hearing in the office of the Commissioner of Internal Revenue. The sole
5 contention presented in this brief and at the hearing was that the respondent was entitled to assessment under section 210 of the revenue act of 1917. At no time during the course of the proceedings under this claim for refund was any question raised by respondent relative to depreciation of patents or adjustment of value of patents for invested capital purposes. (Finding 6.) At the time of these proceedings it was the regular practice of the commissioner to reject any claim for depletion of patents which had not been made

in the original return. It may have been for this reason that the respondent did not include in its claim for refund a claim based on this specific ground.

On December 17, 1924, the commissioner notified respondent that under the provisions of section 210 of the revenue act of 1917 supra, respondent had been overassessed, and allowed the claim for refund in the amount thus found overassessed and rejected it as to the balance. (Finding 7.)

In January, 1925, the Board of Tax Appeals, in Appeal of Union Metal Manufacturing Co., 1 B. T. A. 395, decided that a taxpayer who had made a specific claim for refund was entitled to a deduction on account of exhaustion of patents, notwithstanding the fact that no such claim had been made in the original return. Thereupon the bureau announced that it acquisced in that decision. (IV–1 Internal Revenue Cum. Bull., p. 3.)

6 In due course the respondent brought this suit in the Court of Claims and for the first time claimed a deduction on account of exhaustion of patents. The Court of Claims awarded it judgment for $26,909.50 with interest.

Questions presented

1. Whether the Comissioner of Internal Revenue, by failing to object to the insufficiency of the respondent's claim for refund, and by acting on the claim so far as it was specific, waived objection to the insufficiency of the claim as to matters not specifically mentioned.

2. Whether the respondent's failure to file a specific claim for refund on the ground of exhaustion of patents was excused because at the time it was known that such a claim would be rejected by the commissioner.

3. Whether, if there was no waiver, and if the failure to file a specific claim for refund was not excused, the taxpayer is entitled to recover on a ground not set forth in its claim for refund.

7 ## Assignments of error

1. The Court of Claims erred in holding that the respondent should be allowed a deduction for exhaustion of patents in spite of its failure to file a specific claim for such a deduction.

2. The Court of Claims erred in giving judgment for the respondent.

Reasons for granting the writ

1. Error was committed by the Court of Claims in concluding from the facts found that the commissioner waived any insufficiency of the respondent's claim for refund under section 1318 of the revenue act of 1921, supra, and article 1036 of Treasury Regulations 62, supra.

The claim for refund was two-fold—specific in seeking special assessment under section 210 of the revenue act of 1917, supra, and general in referring to "all possible legal rights of the taxpayer." The commissioner did not notify the respondent that it could not, under this claim, raise any point other than that specifically referred to in the claim. The commissioner did consider the specific part of the claim and grant a partial refund after recalculating the
8 taxpayer's invested capital, under section 210 of the revenue act of 1917. (Findings 6 and 7.) This in no way involved any consideration of a deduction for patent exhaustion, a matter provided for in quite a different part of the revenue act. We submit that the Court of Claims was wrong in concluding from such inaction and the partial refund made by the commissioner that he waived the insufficiency of the respondent's claim.

A few cases have considered what constitutes a waiver of the provisions of the statute and regulation in question. In Tucker v. Alexander, 275 U. S. 228, stipulation by counsel in open court at the trial was held such a waiver. In Black v. Bolen, 268 Fed. 427 (W. D. Okla.), Union Trust Co. of Pittsburgh v. McCaughn, 24 F. (2d) 459 (E. D. Pa.,), and Art Metal Const. Co v. United States, 35 F. (2d) 379 (W. D. N. Y.), certain statements written to the taxpayer by the commissioner were held waivers. In the very similar case of Arizona Commercial Mining Co. v. Casey, 32 F. (2d) 288 (D. Mass.), a letter written by the commissioner showing that he had in fact considered the point not raised by the claim for refund was held not to be a waiver of his objection to a suit on this new point. See also Stauffer, Eshleman & Co., Ltd. v. United States, 66 Ct. Cls. 277. But in no case has a waiver been found upon such facts as are present in the instant case.

9 2. The Court of Claims rules in substance that the taxpayer could sue on a basis not disclosed in its claim for refund because it was know at the time the claim was filed that it was the commissioner's policy to reject claims filed on such basis. This decision is in conflict with the reasoning in Rand v. United States, 249 U. S. 503, and Rock Island A. & L. R. R. Co. v. United States, 254 U. S. 141. In each of these cases it was held that the failure to file a claim was not excused because the filing of such a claim would have been futile.

3. If there was no waiver, the Court of Claims erred in allowing recovery on a ground not clearly set forth in the respondent's claim for refund. It is submitted that the reasoning of this court in Tucker v. Alexander, 275 U. S. 228, is conclusive on this point. The lower Federal courts, including the Court of Claims, have decided virtually without exception that under the statute and regulations a taxpayer cannot recover upon a ground distinct from any presented to the commissioner in the claim for refund or not clearly set forth herein. Red Wing Malting Co. v. Willcuts,

15 F. (2d) 626, 634 (C. C. A. 8th), certiorari denied, 273 U. S. 763; Feather River Lumber Co. v. United States, 66 Ct. Cls. 54, certiorari denied, 279 U. S. 837; Jonesboro Grocery Co. v. United States, 66 Ct. Cls. 320, certiorari denied, 280 U. S. 40A; National Candy Co. v. United States, 67 Ct. Cls. 74, 88, certiorari denied, 280 U. S. 60A; Meinrath Brokerage Co. v. Crooks, 28 F. (2d) 991 (W. D. Mo.); Arizona Commercial Mining Co. v. Casey, 32 F. (2d) 288 (D. Mass.); Paul Jones & Co. v. Lucas, 33 F. (2d) 907 (W. D. Ky.); Phoenix Glass Co. v. United States, 34 F. (2d) 217 (W. D. Pa.). The only decisions to the contrary are two cases decided by the same judge in the District of Connecticut. Union & New Haven Trust Co. v. Eaton 20 F. (2d) 419; Warner v. Walsh, 24 F. (2d) 449.

4. Section 1318 of the revenue act of 1921, supra, and article 1036 of Treasury Regulations 62, supra, were devised "for the convenience of Government officials in passing upon claims for refund and in preparing for retrial." Tucker v. Alexander, 275 U. S. 228, 231. The decision of the Court of Claims, if allowed to stand, will result in a multitude of claims for refund in general terms under which taxpayers may at any time raise new objections to taxes collected. Such a condition would greatly impede and delay the commissioner in the proper administration of his duties.

11 Conclusion

Wherefore it is respectfully submitted that this petition should be granted.

THOMAS D. THACHER,
Solicitor General.

MAY, 1930.

12 In Court of Claims of the United States

No. H–62

FELT & TARRANT MFG. CO. vs. THE UNITED STATES

I. *History of proceedings*

On February 14, 1927, the plaintiff filed its original petition.

On March 26, 1927, the defendant filed a general traverse to said petition.

On June 28, 1928, by leave of court, the plaintiff filed an amended petition.

Said amended petition is as follows:

II. *Amended petition*

Filed June 28, 1928

To the honorable the JUDGES OF THE COURT OF CLAIMS OF THE UNITED STATES:

Plaintiff, the Felt & Tarrant Mfg. Co., a corporation organized under the laws of the State of Illinois, and having its principal office and place of business in the city of Chicago, in said State, files this amended petition to recover from the United States of America the sum of $92,121.10 paid to the collector of internal revenue for the First District of Illinois as and for its Federal income and profits tax for the year 1917 in excess of the amount which should have been paid for that year, together with interest; and therefore shows:

13- (1) The plaintiff is and was at all of the times hereinafter mentioned engaged in the trade or business of manufacturing and selling calculating machines, commonly known as comptometers.

(2) On or about the 15th day of March, 1918, the plaintiff filed with the said collector of internal revenue its income and profits tax return for the year 1917.

(3) On or about the 14th day of June, 1918, the plaintiff paid to said collector of internal revenue the income and profits tax shown to be due and payable by said return—namely, $260,328.05.

On or about the 10th day of April, 1925, plaintiff paid an additional amount of $2,436.30 on account of taxes for calendar year 1917.

(4) On or about the 17th day of December, 1924, the Commissioner of Internal Revenue determined that plaintiff's correct income and profits tax liability for the year 1917 was $241,994.58, and the amount by which the plaintiff had overpaid its taxes for the year 1917, according to said determination of the commissioner—namely, $20,769.77—was credited against and in reduction of income and profits taxes then claimed to be due from the plaintiff for the calendar year 1918.

(5) On March 1, 1913, and continuously thereafter until a date subsequent to December 31, 1917, the plaintiff owned the patents listed below. The numbers assigned to such patents by the United States Patent Office, the respective dates of issue, the unexpired life as of March 1, 1913, of each of said patents and the average unexpired life of said patents was as follows:

14

Patent numbers	Dates of issue	Unexpired life as of March 1, 1913
671109	April 2, 1901	5 years, 33 days.
733370	July 14, 1903	7 years, 136 days.
762520	June 14, 1904	8 years, 106 days.
762521	June 14, 1904	8 years, 106 days.
767107	Aug. 9, 1904	8 years, 162 days.
982416	Jan. 24, 1911	14 years, 330 days.
982417	Jan. 24, 1911	14 years, 330 days.
1023344	June 4, 1912	16 years, 96 days.
Average unexpired life as of March 1, 1913		10 years, 162 days.

(6) The plaintiff used or employed all of said patents during the whole of the year of 1917 in its trade or business.

(7) The value of said patents on March 1, 1913, was $1,386,919.24.

(8) The income and profits tax shown to be due on the plaintiff's return for the year 1917 filed as aforesaid was based upon a computation of the plaintiff's net income for the year 1917, in which no reduction was made from the plaintiff's gross income for the year 1917 for the exhaustion of said patents.

(9) The income and profits tax for the year 1917 determined by the Commissioner of Internal Revenue to be due from the plaintiff as alleged in paragraph 4 above was based upon a computation of the plaintiff's net income for the year 1917, in which no deduction had been made from the plaintiff's gross income for the year 1917 for the exhaustion of said patents.

(10) During the whole of the year 1917 the plaintiff owned and used or employed in its trade or business the patents listed below.

All of said patents were acquired subsequent to March 1, 1913,
15 and on or about the dates upon which they were issued by the United States Patent Office. The monopoly granted by none of said patents had expired prior to December 31, 1917. The numbers of said patents and the dates upon which they were issued by the United States Patent Offiec are as follows:

Patent numbers	Date of issue
1,066,096	July 1, 1913
1,752,934	Sept. 9, 1913
1,072,993	Sept. 9, 1913
1,074,704	Oct. 7, 1913
1,074,705	Oct. 7, 1913
1,074,689	Oct. 7, 1913
1,088,219	Feb. 24, 1914
1,154,897	Sept. 28, 1915
1,110,734	Sept. 15, 1914

(11) Prior to the respective dates upon which said patents were issued and during the years 1910, 1911, 1912, and 1913, the plaintiff expended in acquiring and developing said patents the sum of $136,519.63.

(12) The income and profits tax shown to be due on the plaintiff's return for the year 1917, and paid as alleged in paragraph 3 above, was based upon a computation of the plaintiff's net income for the year 1917, in which no deduction was made from the plaintiff's gross income for the year 1917 for the exhaustion of said patents.

(13) The income and profits tax for the year 1917 determined by the Commissioner of Internal Revenue to be due from the plaintiff as alleged in paragraph 4 above was based upon a computation of the plaintiff's net income for the year 1917, in which no deduction had been made from the plaintiff's gross income for the year 1917 for the exhaustion of said patents.

16 (14) Prior to January 1, 1917, and during the years 1900 to 1916, both inclusive, the plaintiff expended the sum of

$377,454.02 in acquiring and developing the patents described and enumerated in paragraphs 5 and 10 above and certain inventions for which patents were thereafter issued.

(15) The total depreciation or exhaustion of the cost of said patents form the respective dates upon which they were issued to and including December 31, 1916, was the sum of $60,697.90.

(16) The income and profits tax shown to be due on the plaintiff's return for the year 1917, filed as alleged in paragraph 2 above, was based upon a computation of the plaintiff's invested capital for the year 1917 in which only $20,454.02 of said sum of $377,454.02 was included in invested capital.

(17) The income and profits taxes for the year 1917 determined by the Commissioner of Internal Revenue to be due from the plaintiff, as alleged in paragraph 4 above, were based upon a computation of the plaintiff's invested capital for the year 1917, in which only $20,454.02 of said sum of $377,454.02 was included in invested capital.

(18) The plaintiff avers that the assessment and collection of said taxes without allowing a deduction from the plaintiff's gross income for the exhaustion of said patents, and without including in the plaintiff's invested capital the entire amount expended in the acquisition and development of said patents less the depreciation or exhaustion of the cost of said patents from the respective dates upon which said patents were issued to and including December 31, 1916, as alleged above, was erroneous and illegal and led to the im-
17 position of income and profits taxes greater than the correct and lawful amount thereof to the extent of $92,121.10.

(19) On or about January 31, 1923, the plaintiff filed with the Commission of Internal Revenue a waiver of its right to have its income and profits taxes for the year 1917 determined and assessed within five years after its return for said year was filed.

(20) On or about the 29th day of February, 1924, the plaintiff filed with the collector of internal revenue for the First District of Illinois, a claim for the refund of income and profits taxes erroneously or illegally assessed and collected for the year 1917 in the sum of $214,122.01. A copy of said claim is attached hereto and made a part hereof, marked "Schedule A."

(21) Said claim for refund was rejected by the Commissioner of Internal Revenue on or about the 16th day of February, 1925.

(22) Plaintiff avers that it has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government; that it is the sole and absolute owner of the claims herein presented; that it has made no transfer or assignment of said claim or any part thereof; and that it is justly entitled to the amount claimed herein from the United States after allowing all just credits and set offs.

Plaintiff, therefore, prays judgment in its favor against the United States in the sum of $92,121.10, with interest from June 14, 1918, the date of the payment of the said tax.

FELT AND TARRANT MFG. CO.,
By WM. F. BABCOCK, *Treas.*

ROBERT H. MONTGOMERY,
Attorney for Plaintiff.

18 [*Duly sworn to by Wm. F. Babcock; jurat omitted in printing.*]

19 *Schedule A to amended petition*

(Execute separate form for each tax period)

Treasury Department, Internal Revenue Service.
Form 843—Jan., 1922. Comptroller General U. S. January 18, 1922.

IMPORTANT.—File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in.

CLAIM FOR

Abatement of tax assessed
Credit against outstanding assements
XX Refund of taxes illegally collected
Refund of amounts paid for stamps used in error or excess

NOTICE TO COLLECTOR.—Collector must indicate in block above the kind of claim, except in income-tax cases.

Date received by administrative unit, ——— (stamp here).
Collector's notation: District, ———. Account number, ———.
Date received, ——— (stamp here). ——— ———, collector of internal revenue.

State of Illinois,
County of Cook, ss:

FELT AND TARRANT MFG. CO.,
(Name of taxpayer or purchaser of stamps)

1717 North Paulina Street,
(Residence—give street and number as well as city or town and State)

Chicago, Illinois.
(Business address)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period	Year
	From: Jan. 1	1917
	To: Dec. 31	1917

1. Business in which engaged: Manufacture and sale of calculating machines.
2. Character of assessment or tax———
(State for or upon what the tax was assessed or the stamps affixed)

3. Amount of assessment or stamps purchased $200,328.05
4. Reduction of Tax Liability requested (income and profits tax) .. 214,122.01
5. Amount to be abated.
6. Amount to be refunded (or such greater amount as is legally refundable) 214,122.01
7. Dates of payment (see collector's receipts or indorsements of canceled checks): June 15, 1918.
(If statement covers income tax liability, items 8–11 inclusive must be answered.)
8. District in which return (if any) was filed: Chicago.
9. District in which unpaid assessment appears.....
10. Amount of overpayment claimed as credit ..... $.....
11. Unpaid assessment against which credit is asked; period from ..... to ..... $.....

Deponent verily believes that this application should be allowed for the following reasons:

The taxpayer has filed with the commissioner a claim for special relief under section 210 of the 1917 revenue act for the excess profits tax assessed for this period.

This claim is filed to protect all possible legal rights of the taxpayer, pending, and at the rate of, the settlement of the claim for relief. Computation has been made as follows:

Total profits taxes paid	$227,789.38
Less: Decrease in income taxes on account of profits taxes credit ..	13,667.37
Refund claimed	214,122.01

The taxpayer requests an oral hearing and the right of appeal in the event of an adverse decision on the part of the unit and before any formal rejection of the claim is made.

FELT & TARRANT MANUFACTURING CO.
(Signed) WILLIAM F. BABCOCK, *Treasurer.*

Sworn to and subscribed before me this 29th day of February, 1924.
CHARLES A. STEFFEN.

20 III. *General traverse*

Filed Aug. 7, 1928

And now comes the Attorney General, on behalf of the United States, and, answering the amended petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the amended petition be dismissed.

HERMAN J. GALLOWAY,
Assistant Attorney General.

IV. *Argument and submission of case*

On December 17, 1929, this case was argued and submitted on merits by Mr. Thomas G. Haight, for plaintiff, and by Mr. R. C. Williamson, for defendant.

21 V. *Findings of fact, conclusion of law, and opinion of the court, by Booth, Ch. J.*

Filed February 17, 1930

Mr. Thomas G. Haight for plaintiff. Messrs. Robert H. Montgomery, J. Marvin Haynes, James O. Wynn, and C. J. McGuire were on the brief.

Mr. Ralph C. Williamson, with whom was Mr. Assistant Attorney General Herman J. Galloway, for the defendant. Mr. Ottamar Hamele was on the brief.

This is a suit to recover for the exhaustion of patents owned and used by plaintiff prior to March 1, 1913. The case is contested by the defendant on the sufficiency of the claim for refund of the amount of depreciation of patents.

The facts are stipulated.

1. Plaintiff, Felt & Tarrant Manufacturing Company, is a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business in the city of Chicago, State of Illinois.

2. On April 1, 1918, plaintiff filed with the collector of internal revenue for the first district of Illinois its income and excess profits tax returns for the calendar year 1917, showing a tax liability of $260,328.05. This amount was paid to said collector of internal revenue on June 15, 1918.

3. On November 10, 1919, the Commissioner of Internal Revenue notified the plaintiff that a redetermination of its tax liability for the calendar year 1917 resulted in an overassessment of $20,769.77. On June 19, 1920, said collector of internal revenue credited the last-named sum against income and profits taxes assessed against plaintiff for the calendar year 1918.

4. On February 2, 1923, plaintiff filed with the Commissioner of Internal Revenue a waiver of its right to have its income and excess profits taxes for the calendar year 1917 assessed within five years from the date its return for that year was filed. This waiver extended the period for making assessments to March 1, 1924.

5. In March, 1923, additional income and excess profits taxes for the calendar year 1917 of $19,486.85 were assessed against the plaintiff.

6. On February 29, 1924, plaintiff filed with said collector of internal revenue a claim for the refund of $214,122.01. A true copy thereof is attached to plaintiff's amended petition as Schedule A,
22 and is made a part hereof by reference thereto. Under this claim the plaintiff filed a brief and had an oral hearing in the office of the Commissioner of Internal Revenue. The sole contention presented by the plaintiff in said brief and at said hearing was that the plaintiff was entitled to assessment under section 210 of the revenue act of 1917. At no time during the course of the proceedings under said claim for refund was any question raised

by plaintiff relative to depreciation of patents or adjustment of value of patents for invested capital purposes.

7. On December 17, 1924, the Commissioner of Internal Revenue notified the plaintiff that a reaudit of its income and excess profits tax returns for the calendar year 1917 under the provisions of section 210 of the revenue act of 1917 disclosed a total tax liability of $241,994.49 and a resultant overassessment of $17,050.55. The aforesaid claim for refund of $214,122.01 was allowed for $17,050.55 and the balance was rejected by the Commissioner of Internal Revenue on February 16, 1925.

8. On April 15, 1925, said collector of internal revenue abated $17,050.55 of the aforesaid additional assessment of $19,486.85 made in March, 1923. The balance of $2,436.30 of the additional assessment of $19,486.85 was paid by plaintiff on April 10, 1925.

9. On March 1, 1913, and continuously thereafter until a date subsequent to December 31, 1917, the plaintiff owned the patents listed below. All of said patents were acquired prior to March 1, 1913, and on or about the dates upon which they were issued by the United States Patent Office. The numbers assigned to such patents by the United States Patent Office, the respective dates of issue, the unexpired life as of March 1, 1913, of each of said patents, and the average unexpired life of said patents were as follows:

Patent numbers	Dates of issue	Unexpired life in months as of March 1, 1913
671109	Apr. 2, 1901	61
738379	July 14, 1903	89
762520	June 14, 1904	100
762521	June 14, 1904	100
767107	Aug. 9, 1904	101
982416	Jan. 24, 1911	179
982417	Jan. 24, 1911	179
1028344	June 4, 1912	195
	Total	1,004

10. The value of the aforesaid patents on March 1, 1913, was $821,557.79. The monthly total exhaustion rate of the aforesaid patents during their life was $818.28465. In the taxable year 1917 there was a total time exhaustion of 96 months. The value exhaustion in 1917 was $78,455.33 ($96 \times \$818.28465 = \$78,455.33$).

11. In the determination of the aforesaid 1917 tax liability of $241,994.49, finding 7, no deduction was made from plaintiff's gross income for the year 1917 for the exhaustion of the patents, as set forth in finding 10.

12. In addition to the patents listed in finding 9, the plaintiff owned and used or employed in its trade or business during the year 1917 patents listed below. All of said patents were acquired
23 subsequent to March 1, 1913, and on or about the dates upon which they were issued by the United States Patent Office.

The monopoly granted by said patents had not expired prior to December 31, 1917. The numbers of said patents and the dates upon which they were issued by the United States Patent Office are as follows:

Patent numbers	Dates of issue
1066096	July 1, 1913
1152954	Sept. 9, 1913
1072093	Sept. 9, 1913
1074704	Oct. 7, 1913
1074705	Oct. 7, 1913
1074689	Oct. 7, 1913
1088219	Feb. 24, 1914
1154897	Sept. 28, 1915
1110784	Sept. 15, 1914

13. Prior to the respective dates on which the patents listed in finding 12 were issued plaintiff expended in acquiring and developing said patents the sum of $136,846.23. This cost was exhausted during the taxable year 1917 to the extent of $8,049.77.

14. In the determination of the aforesaid 1917 tax liability of $241,994.49, finding 7, no deduction was made from plaintiff's gross income for the year 1917 for the exhaustion of the patents as set forth in finding 13, nor has plaintiff at any time for the year 1917 had the benefit of any such deduction in the determination of its 1917 tax liability.

15. Plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government. It is the sole and absolute owner of the claim herein presented, and it has made no transfer or assignment of said claim or any part thereof.

16. If the court finds that the plaintiff is not barred by section 3226 of the United States Revised Statutes, as amended, from claiming in this suit as deductions from gross income the amounts of $78,455.33 and $8,049.77, described in findings 10 and 13, then judgment should be for the plaintiff in the amount of $26,909.50, plus interest as provided by law.

17. If the court finds that the plaintiff is barred by section 3226 of the United States Revised Statutes, as amended, from claiming in this suit as deductions from gross income the amounts of $78,455.33 and $8,049.77, described in findings 10 and 13, then judgment should be for the defendant.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover $26,909.50 with interest.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty-six thousand nine hundred nine dollars and fifty cents ($26,909.50), with interest at the rate of six per cent per annum from the dates of payments to such date as the Commissioner of Internal Revenue may determine,

in accordance with the provisions of subsection (b), section 177 of the Judicial Code, being a part of the revenue act of May, 1928.

24 *Opinion*

BOOTH, Chief Justice, delivered the opinion of the court:

The history of this tax case follows in sequential order, viz:

(a) April 1, 1918: Plaintiff filed income and excess profits tax return, tax liability		$260,328.05
(b) June 15, 1918: Plaintiff paid tax disclosed by above return		260,328.05
(c) November 10, 1919: Commissioner determined an overassessment of		20,769.77
(d) June 19, 1920: Commissioner credited overassessment (item c) to 1918 taxes		20,769.77
(e) February 2, 1923: Plaintiff filed written waiver of limitations extending date to March 1, 1924.		
(f) March, 1923: Commissioner determined a deficiency in 1917 tax of		19,486.85
(g) February 29, 1924: Plaintiff filed claim for a refund of 1917 tax to amount of		214,122.01
Refund claim was accompanied by a brief and request for oral argument. The refund claim is set out in the findings.		
(h) December 17, 1924: Commissioner determined plaintiff's 1917 tax as follows:		
Total tax liability	$241,994.49	
Overassessment	17,050.55	
(i) February 16, 1925: Official allowance of refund claim (item g) for $17,050.55. Rejected as to balance claimed.		
(j) April 10, 1925: Plaintiff paid balance of 1917 tax as per rulings of the commissioner		2,436.30
(k) April 15, 1925: Commissioner abated tax of 1917 to extent of		17,050.55

Plaintiff sues to recover $26,909.50 and interest, alleged as an overpayment of taxes due to a failure to allow a deduction from gross income for the year 1917 for exhaustion of patents acquired by the plaintiff and used by it in its business prior to March 1, 1913. The defendant concedes the amount and likewise admits that the single impediment to recovery is the sufficiency of the refund claim filed February 29, 1924. The various steps taken in the final determination of plaintiff's 1917 tax liability, as appears from the history of the case set forth above, discloses indisputably that the refund claim of February 29, 1924, was filed with the commissioner within the statutory period of limitations and over a year prior to the final determination of the tax liability of the plaintiff for 1917.

The refund claim of February 29, 1924—the important instrument involved herein—reads in part as follows:

"The taxpayer has filed with the commissioner a claim for special relief under section 210 of the 1917 revenue act for the excess-profits tax assessed for this period.

"This claim is filed to protect all possible legal rights of the taxpayer, pending and at the date of, the settlement of the claim for relief. Computation has been made as follows:

"Total profits taxes paid	$227,789.38
Less: Decrease in income taxes on account of profits taxes credit	13,667.37
Refund claimed	214,122.01"

The taxpayer requested an oral hearing and the right of appeal in the event of an adverse decision on the part of the unit, and before any formal rejection of the claim was made.

27. Section 210 of the revenue act of 1917 (40 Stat. 307) provides for special assessments, and it is to be noted that the refund claim makes no specific mention of a deduction from gross income on account of exhaustion of patents.

Section 1318 of the revenue act of 1921 (42 Stat. 227), upon this subject, provides as follows:

"That section 3226 of the Revised Statutes is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. * * *"

Article 1036, Treasury Regulations 62, prescribed as follows:

"Claims for refund of taxes erroneously collected.—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath."

Section 1318 and the regulations cited undoubtedly require that all the facts relied upon for a refund should be set forth under oath. The courts have construed section 1318 and the regulations made in pursuance of the authority granted therein. The cases, which we need not review in detail, are harmonious upon the point that the purpose and intent of the statute is to afford the commissioner an opportunity to correct errors specified in the refund claim, and to enable the taxpayers to escape the necessity for needless and burdensome litigation. Tucker v. Alexander, 275 U. S. 228; Red Wing Malting Co. v. Willcuts, 15 Fed. (2d) 626; Feather River Lumber Co. v. United States, 66 C. Cls. 54; Jonesboro Grocer Co. v. United States, 66 C. Cls. 320; Phoenix Glass Co. v. United States, P-H Fed. Tax Service, 1929, sec. 834; National Candy Co. v. United States, 67 C. Cls. 74. In the case of Tucker v. Alexander (supra) the Supreme Court, in speaking of the statute and regulations, used this language:

"The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of Government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery."

The Alexander case turned upon the question of waiver of the sufficiency of the refund claim. A similar contention is advanced

by the plaintiff in this case. It is to be observed from the history of this case that the plaintiff did not in its original tax return claim a deduction from gross income for the year 1917 for depreciation or exhaustion of patents owned and used by it. This is important, in view of the fixed attitude of the Internal Revenue Bureau with reference to claimed deductions of this character. The com-
26 missioner's Regulations 45, article 163, p. 69, provided for a deduction from gross income on account of depreciation of patents. In article 167 of Regulations 45, page 70, it was provided that in computing depreciation allowance in case of a patent, the capital sum to be replaced was the cost not already deducted as a current expense, or its fair market value as of March 1, 1913, if acquired prior thereto. In an opinion from the Committee on Appeal and Review (Cumulative Bulletin III–1, page 176), it was held that the right to charge off depreciation of patents was optional with the taxpayer, i. e., a privilege to do so if the taxpayer saw fit to avail himself of the privilege, and that the right to exercise the option or privilege extended to and was only open to the taxpayer during the time for filing the *original* return (italics ours); that if not claimed in the orignial return for the year the taxpayer with respect to that year was thereafter precluded from claiming the deduction. The foreging opinion of the committee on appeal and review was supported by a memorandum opinion of the Solicitor of Internal Revenue, and from henceforward until June, 1925, the commissioner observed and continued the policy of refusing deductions from gross income on account of depreciation of patents unless the deduction was specifically claimed in the original return for the year involved. In June, 1925, the Board of Tax Appeals, in the case of the Union Metal Manufacturing Co., 1 B. T. A. 395, decided that a taxpayer was entitled to depreciation of patents notwithstanding the fact that no claim for such a deduction had been made in the original return, thereby withholding approval of the previous and settled policy of the bureau. Subsequent to the decision of the board the commissioner, in Internal Revenue Cumulative Bulletin IV–2 for the period January 1 to June 30, 1925, published at page 3 thereof, some time after the last-mentioned date, acquiesced in the decision of the board in the Union Metal Mfg. Co. case, and thereafter the rule of the bureau as to an allowance from gross income of deduction on account of depreciation of patents was changed and the allowance given consideration. Therefore it is apparent from recited events that at the time the plaintiff's refund claim was filed and on the date it was rejected the published decisions of the commissioner absolutely prevented the plaintiff, in so far as the bureau was concerned, from taking a deduction from gross income for depreciation of patents for the year 1917. It would have been a useless and futile act to have specified in detail with respect to patent depreciation in the face of adhered-to adjudications upon the subject, and the commissioner was not deprived of any knowledge or in any way misled by the failure of the plaintiff to make a detailed claim as to patent

depreciation. Had it been so made it would have been rejected upon prior holdings. Under these circumstances it is, we think, established that in so far as the intended purpose of the statute and regulations is concerned—an intent and purpose ascribed to them in various decisions of the courts—the commissioner was not denied the privilege of passing upon the merits of plaintiff's tax liability under the return filed and the refund claim of February 29, 1924. The determination of the plaintiff's tax liability was evidently involved. It required a period of seven years to bring it to a conclusion, and the final closing of the proceedings was not until April 10, 1925. The plaintiff, it is true, might have petitioned the commissioner for a reconsideration of his refund claim following the reversal of policy with respect to patents in June, 1925; but it is also true that a reconsideration was manifetsly fraught with the apparent and almost certain rejection for the very reasons insisted upon by the defendant here, and the additional danger of delay in reconsideration carrying its final determination beyond the statutory limitations allowing suit for the recovery of illegal tax exactions in this court. If the oft-repeated adjudication of the intent of the law and the purpose to be served in exacting, particularly in refund claims, is to govern in its application to an admitted illegal exaction, this case falls squarely within such a rule. The refund claim filed was much in excess of the amount sued for in this case. It was rejected as to $197,071.46, and it is difficult to perceive a valid reason for denying judgment upon the restricted basis of a failure to do what would have been of no benefit to either party if it had been done.

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In addition to what has been said, the refund claim relied upon did on its face indicate in express terms a distinct reservation and determination to insist upon the refund of all illegal tax exactions. By the use of such comprehensive terms it is to say the least perfectly apparent that the taxpayer notified the commissioner that all its legal rights would be insisted upon. True, such general terms do not meet the express provisions of the regulation; but as said, not without some merit, the commissioner received the refund claim, acted upon it as it was, and a year thereafter actually granted a refund of $17,050.55. No complaint was lodged as to its generality in any respect at the hearing thereon and no exceptions taken as to its consideration at any time. The Supreme Court reversed the lower court in the Tucker *v.* Alexander case (supra). In the opinion the court said:

"If the commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the Government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings."

In the above case there was an entire absence of any specification of the nature of the claim relied upon in the refund claim filed by

the taxpayer, the taxpayer contending for a new and entirely different state of facts for relief. The Government interposed no objections to the proceedings at the trial, and the Supreme Court reversed the decision of the lower court in refusing a judgment for the taxpayer, holding that the right to insist upon a strict claim for refund had been waived by the commissioner. While it may be going too far to extend the rule in the above case to this one, nevertheless it is worthy of observation to call attention to the fact that in this case the plaintiff is not insisting upon a claim different from one falling within the comprehensive language used in the refund claim, and that the commissioner was not in any sense misled
28 as his prior rulings disclose, and he acted upon and made a refund without objection to the refund claim in any particular. The final action of the commissioner as to the refund claim was confined to the subject matter of section 210 of the act of 1917, i. e., special assessment, and it seems to us that notwithstanding the general language of the refund claim in other respects the commissioner would have been warranted in refunding any sums found to be due as overassessments for other causes.

Judgment will be awarded the plaintiff for $26,909.50 with interest. It is so ordered.

WILLIAMS, Judge; LITTLETON, Judge; and GRAHAM, Judge, concur. GREEN, Judge, dissents.

29 VI. *Judgment*

At a court of claims held in the city of Washington on the 17th day of February, A. D., 1930, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of Twenty-six thousand nine hundred nine dollars and fifty cents ($26,909.50), with interest at the rate of six per cent per annum from the dates of payments to such date as the Commissioner of Internal Revenue may determine, in accordance with the provisions of subsection (b), section 177 of the Judicial Code, being a part of the revenue act of May, 1928.

30 [Clerk's certificate to foregoing transcript omitted in printing.]

[Endorsement on cover:] File No. 35027. Court of Claims. Term No. 896. The United States, petitioner vs. Felt & Tarrant Mfg. Co. Petition for writ of certiorari and exhibit thereto. Filed May 14, 1930. File No. 35027.

U. S. GOVERNMENT PRINTING OFFICE: 1930

31 Supreme Court of the United States

Order allowing certiorari

Filed June 2, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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